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ABDULL AZIZ ALI & ANOR

v.

THIYAGU RAJAGOPAL

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HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[CIVIL APPEAL NO: 12B-130-07-2012]
21 MAY 2013

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TORT: *Negligence - Damages - Bus parked at road side - Motorcyclist collided into bus while trying to avoid another vehicle - Whether motorcyclist rode at access speed - Whether suffered damages - Whether cost of nursing care and loss of earnings awarded*

D

TORT: *Damages - Appeal against quantum and liability - Road accident - Multiplier and multiplicand - Life expectancy of plaintiff - Whether justified - Cost of nursing care - Pampers and milk - Whether separate claims - Whether cost for nursing care manifestly high - Whether claim for loss of earnings allowed*

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This appeal arose out of a running down claim for personal injuries in the Sessions Court following an accident between a motorcycle ridden by the plaintiff and a motor lorry which was parked by the first defendant ('D1') at the side of the road. On the day of the accident, the plaintiff, aged 18 years old, was riding his motorcycle when a motor car from the opposite direction which was overtaking another vehicle encroached into his path. He tried to avoid the motor car by evading to

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the left but was obstructed by the defendants' motor bus which was parked on the left side of the road. As a result, he collided into the said motor bus causing him to suffer injuries. D1 who was not at the scene at the material time did not witness the accident. The Sessions Court Judge ('SCJ') found D1 wholly liable for the accident. There was no

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evidence of any contributory negligence by the plaintiff because the damage to his motorcycle was minimal indicating that he was not riding fast and that the plaintiff could not be faulted for evading to the left and colliding into the defendants' motor bus as he had acted in the agony of the moment. The plaintiff testified that before the accident he was

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employed by a car wash business earning about RM1,200 per month. To substantiate his claim, the plaintiff produced a letter from his employer stating details of his employment and remuneration. The employer was also called as a witness ('PW7'). PW7 confirmed that the plaintiff was employed by him as a supervisor. However, the SCJ dismissed the claim by the plaintiff for loss of earnings by stating that

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the claim had not been proved by reliable evidence. For cost of pre-trial nursing care, the appeal was against the multiplicand of RM2,000 per

month awarded by the SCJ. The SCJ stated that the award was inclusive of cost of pampers, milk and the difficulty in getting a maid but failed to explain how the figure of RM2,000 was arrived at. In respect of the post trial nursing care, the dispute between the parties was as to the multiplier as well as the multiplicand. In regard to the multiplier, the SCJ adopted a multiplier of 40 years post injury. The SCJ accepted the finding in the defendants' specialist report that the plaintiff's life span as a person who sustained complete paralysis of the lower limbs as a result of a spinal cord injury would be 58 years. It was submitted that this figure was speculative in nature considering that no independent evaluation of the life expectancy of the plaintiff had been done and different variables could have been applied in the estimate. As for the multiplicand, the SCJ awarded a figure of RM3,646 per month on the ground that the plaintiff was entitled to be cared for in a special nursing institution. The plaintiff's quotation was for nursing care at the Columbia Asia Extended Care Hospital located in Shah Alam, Selangor. The defence, however, provided quotation from one Lotuskrish Care Centre home which was located in Johor Bahru barely 8-9 km from the plaintiff's home with a cost of nursing care of RM1,500 per month. The defendants contended that the plaintiff's quotation was exorbitant and unjustified. The defendants appealed against the decision of the SCJ on both issues of liability and quantum while the plaintiff cross-appealed on quantum in respect of the award on post-trial nursing care as regards the multiplier and dismissal of the claim for loss of earnings.

Held (allowing appeal and cross-appeal on quantum):

(1) The primary cause of the collision was the negligence of D1 in parking the motor bus at the said spot and causing a wrongful obstruction to the plaintiff who was then riding on his rightful path. This was a pure finding of fact based on evaluation of the evidence of all the material witnesses and their credibility, including the evidence in the form of the police sketch-plan and key. The evidence of the plaintiff that he had evaded to the left and collided into the motor bus to avoid an oncoming car that had suddenly encroached into his path was accepted by the SCJ as credible and probable after having heard and considered the evidence of the relevant witnesses. This was an issue for the trial court to decide. (paras 9 & 10)

(2) There was nothing to show that the SCJ had seriously erred or misdirected himself on the facts in arriving at this finding of fact which was an issue for the trial court to decide. Based on the analysis of evidence and the reasons given by the SCJ for his factual findings, the decision finding the defendants wholly liable for the

A accident could not be said to be clearly wrong or a misdirection on the facts or in law. Therefore, the appeal on liability had no merits and had to be dismissed. (paras 10 & 12)

(3) Based on the serious injuries and disabilities suffered by the plaintiff, it was indisputable that he could no longer be employed. Even if the plaintiff could not prove that he had earned the amount claimed, the SCJ should have considered awarding a reasonable sum as loss of earnings based on the totality of the evidence adduced on this issue. Therefore, the SCJ was wrong in failing to give due consideration to the evidence adduced on this claim and to make a reasonable award. The decision of the SCJ was set aside and a reasonable award was awarded for this head of claim which was assessed to be RM500 per month on the statutory multiplier of 16 years which amounted to RM96,000. (paras 15 & 16)

(4) Cost of care does not include other items like cost of pampers and milk powder. These were separate claims. It is trite law that any claim for special damages must be specifically pleaded and strictly proved. The SCJ had erred in principle in awarding a sum of RM2,000 per month by taking into account items for which no claim was made. Thus the proper award for this claim should be RM1,000 per month. The award of the SCJ was accordingly set aside and awarded this sum which amounted to RM72,000 on a multiplier of six years. Further, the SCJ was not incorrect and had not erred in assessing the multiplier to be adopted as 40 years based on the estimated life expectancy of 58 years. Having adopted a reduced life expectancy age, there was no further need to make a deduction of one third for contingencies. (paras 17, 19 & 22)

(5) The SCJ failed to consider certain material factors before deciding to make the award by accepting *in toto* the plaintiff's quotation and evidence on the issue of nursing care. Nowhere in the SCJ's grounds of decision was there any mention of why he had not considered an award based on the nursing care at Lotuskrish Care Centre which appeared to be more suitable for the plaintiff. Therefore, the SCJ had erred in awarding cost of nursing care based on the manifestly high quotation tendered by the plaintiff of the cost at Columbia Asia Extended Care Hospital without sufficient justification. Therefore, the award of the SCJ on this item was set aside and substituted with the award of RM1,500 per month as per the quotation from Lotuskrish Care Centre on a multiplicand of 40 years less RM72,000 awarded for pre-trial nursing care which amounted to RM648,000. (paras 24-26)

Case(s) referred to:

Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor [1995] 4 CLJ 317 HC ***(refd)***

Chan Loo Khee v. Lai Siew San & Ors [1971] 1 LNS 17 FC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Flint v. Lovell [1935] 1 KB 354 ***(refd)***

Ludhiana Transport Syndicate & Anor v. Chew Soo Lan & Anor [1979] 1 LNS 50 PC ***(refd)***

Renhome Bricks Factory Sdn Bhd & Anor v. Watah Umpin [2009] 9 CLJ 494 HC ***(refd)***

Sam Wun Hoong v. Kader Ibramshah [1981] 1 LNS 103 FC ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***

Legislation referred to:

Road Traffic Act 1987, ss. 48, 68(3)

Road Traffic Rules 1959, r. 16

For the respondent/plaintiff - VK Dasaratharaj Pillai; M/s Michael Teoh, Balan & Ida

For the appellants/defendants - M Sooriabalan; M/s G Dorai & Co

[Appeal from Session Court, Johor Bahru; Summons No: 53-1228-2011]

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy JC:

[1] This appeal arises out of a running down claim for personal injuries in the Sessions Court based on an accident between a motorcycle ridden by the plaintiff (P) and a motor lorry owned by the second defendant (D2) which was parked by the first defendant (D1) at the side of the road. The learned Sessions Court Judge ('SCJ') found D1 wholly liable for the accident after a full trial and proceeded to award general and special damages. The defendants appealed against the decision of the SCJ on both issues of liability and quantum while P cross-appealed on quantum in respect of the award on post-trial nursing care as regards the multiplier and dismissal of the claim for loss of earnings.

Liability

[2] P's version of the accident was that on the day in question, at about 2.30pm, he was riding his motorcycle on his lawful path on Jalan Suria 70, Bandar Seri Alam, Masai, Johor when a motor car from the opposite direction which was overtaking another vehicle encroached into

his path. He tried to avoid the motor car by evading to the left but was obstructed by the defendants' motor bus which was parked on the left side of the road. As a result, he collided into the said motor bus causing him to suffer injuries which are the subject-matter of this claim. The direction the motor bus was facing in the parked position was against the flow of traffic.

[3] The SCJ found the defendants liable for negligence for causing the accident as the motor bus had obstructed P's lawful path at the material time when it was parked along a main road and not in a designated area for parking of vehicles including buses. He found D1's explanation that he had to park the motor bus there because there was no other place for parking buses to be unacceptable. He accepted the evidence of the investigating officer (PW4) that there were parking lots reserved for buses in a nearby area.

[4] The SCJ also considered the settlement of a traffic summons issued to D1 under s. 48, Road Traffic Act, 1987 as an admission of the offence. The section reads:

> If any driver of a motor vehicle causes or permits such motor vehicle to remain at rest on any road in such a position or in such a condition or in such circumstances as to be likely to cause danger, obstruction or undue inconvenience to other users of the road or to traffic, he shall be guilty of an offence.

He found this admission to be consistent with negligence on the part of D1 who had also breached r. 16, Road Traffic Rules (Highway Code) and s. 68(3), RTA by parking at the said spot.

[5] As for contributory negligence, the SCJ found no evidence of any contribution by P for two reasons: (i) damage to his motor cycle was minimal indicating that he was not riding fast; and (ii) P could not be faulted for evading to the left and colliding into the defendants' motor bus as he had acted in the agony of the moment.

[6] It is clear that the decision of the SCJ on liability was based on findings of facts arrived at after having heard and considered the evidence of the relevant witnesses for both parties, in particular the independent evidence of PW4. Hence, the question arose whether there were valid grounds to interfere with the decision on appeal based on these findings. It is noteworthy that there was no evidence in rebuttal from the defence. D1 who was not at the scene at the material time did not witness the accident.

[7] The contention of the appellants was in essence that the SCJ had seriously erred in his finding that the cause of the collision was the alleged obstruction caused by the defendants' motor bus to P's lawful

and not P's own negligence by riding at an excessive speed and not being a competent rider as he did not possess a valid motorcycle riding licence.

[8] In arriving at his finding that the manner in which D1 parked the motor bus on the side of the main road was proof of negligence, the SCJ had considered the evidence of the material witnesses on this issue, particularly P, the investigating officer (PW4) and the defendants themselves. The defendants' contention was that the SCJ had misconstrued the evidence in finding that it was not proper and lawful for D1 to park the motor bus at the said place. Further, that the proper place for parking as stated by PW4, ie, Jalan Suria 47, being smaller and busier, carried more risks to other road users if the motor bus were to be parked there. PW4 had issued a summons against the defendants' vehicle for a parking offence and the summons was settled by D1. The defendants cannot now argue that no parking offence was committed. The SCJ did not accept D1's explanation that the summons was settled not as an admission of the offence but merely for convenience as otherwise, the road tax for the vehicle could not be renewed. No evidence was adduced to support D1's explanation.

[9] From the overall evidence adduced by P the SCJ was satisfied that the primary cause of the collision was the negligence of D1 in parking the motor bus at the said spot and causing a wrongful obstruction to P who was then riding on his rightful path. This is nothing more than a pure finding of fact based on his evaluation of the evidence of all the material witnesses and their credibility, including the silent evidence in the form of the police sketch-plan and key. P made reference to several authorities on obstruction caused to road users, *inter alia* to *Chan Loo Khee v. Lai Siew San & Ors.* [1971] 1 LNS 17 where Ong CJ held:

> ... If parking a car, however recklessly, so as to cause needless obstruction to other road-users, were to be held blameless, merely because other motorists could still have room to pass, provided they kept a proper look-out, then it would appear that the deliberate parking of a car anywhere, even in the middle of the highway, should be considered equally excusable, if not justifiable, regardless of the fact that, by reason of such obstruction, other motorists had come to grief by reason of their being not fully alert. In such cases there should, in my opinion, be proper apportionment of blame, depending on the circumstances. But, to exonerate the obstructionist completely - when it is undeniable that, but for the presence of the obstruction, there could not possibly have been an accident - is to ignore the principle of placing the blame fairly on those to be blamed for their acts or omissions. In this age of fast motor transport I think it is the duty of the courts to eschew excessive legalism and to require that every

A motorist should observe the golden rule of shewing due consideration for other road-users, or suffer the consequences of his failure to do so.

[10] Having found as above, the only question left for determination by the SCJ was whether there was any evidence of contributory B negligence by P himself. The evidence of P that he had evaded to the left and collided into the motor bus to avoid an oncoming car that had suddenly encroached into his path was not rebutted or contradicted. The SCJ accepted this version as credible and probable after having heard and considered the evidence of the relevant witnesses. There was C nothing to show that he had seriously erred or misdirected himself on the facts in arriving at this finding of fact, which depended to a large extent on the issue of credibility of the witnesses. This was an issue essentially for the trial court to decide.

D **[11]** It is settled law that as a general rule an appellate court will be loath to disturb findings of facts by a trial court which had seen and heard the evidence save for exceptional circumstances that warrant interference. The onus was on the appellant to establish that the trial court had seriously erred in principle or fact in arriving at its decision. In the Federal Court case of *China Airlines Ltd v. Maltran Air Corp Sdn* E *Bhd & Another Appeal* [1996] 3 CLJ 163, Mohamed Dzaiddin Abdullah FCJ (as he then was) said:

> It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the court below be disturbed by the appellate court unless it appears that those findings F are clearly wrong; and it is even more undesirable to do so where the conclusions reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the court which has seen them and judged their honesty and accuracy.

G [See also Privy Council case of *Ludhiana Transport Syndicate & Anor v. Chew Soo Lan & Anor* [1979] 1 LNS 50].

[12] Based on the above analysis of evidence and the reasons given by the SCJ for his factual findings, the decision of the SCJ finding the defendants wholly liable for the accident cannot be said to be clearly H wrong or a misdirection on the facts or in law. I, therefore, held that the appeal on liability had no merits and had to be dismissed.

Quantum

Loss of earnings

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[13] The SCJ dismissed this claim by simply stating that it had not been proved by reliable evidence without explaining how he had analysed and evaluated the evidence adduced regarding P's earnings at the material time.

[14] P testified that before the accident he was employed by a car wash business by the name of Red Line Car Wash earning about RM1,200 per month. He gave evidence of his monthly living expenses on being questioned by the defence. To substantiate his claim P produced a letter [exh. P7] from his employer stating details of his employment and remuneration. The employer was also called as a witness (PW7). PW7 confirmed that P was employed by him as a supervisor in the said business.

[15] The defence challenged P's evidence on his employment as above on the ground that PW7 had never operated the said business. The challenge was mainly because PW6 could not produce any documentary evidence of the existence of the business as well as payment of salary to P. Neither was there proof of tenancy of the premises where the business was operated despite PW6 saying that he had rented the premises. There was also no record of the business having been registered. Be that as it may, the evidence that P was in fact employed at that time was not contradicted or rebutted by the defence. He had also called his employer as a witness and produced a letter on his employment and remuneration. The SCJ had not explained or given reasons as to why he had not considered the evidence of P on earnings. He had merely remarked that there was no reliable evidence to prove the claim for loss of earnings. Based on the serious injuries and disabilities suffered by P, it was indisputable that he could no longer be employed. Even if P could not prove that he had earned the amount claimed, the SCJ should have considered awarding a reasonable sum as loss of earnings based on the totality of the evidence adduced on this issue. In *Renhome Bricks Factory Sdn Bhd & Anor v. Watah Umpin* [2009] 9 CLJ 494, Hamid Sultan Abu Backer JC (as he then was) held:

> It is trite that proof of earnings in accident claims does not necessarily require formal documents such as Income Tax, EPF or SOCSO contributions. Support for the proposition is found in number of cases, namely (i) *Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor* [1995] 4 CLJ 317; (ii) *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103.

[16] In my view, the SCJ was clearly wrong in failing to give due consideration to the evidence adduced on this claim and to make a reasonable award. I, therefore set aside the decision of the SCJ and made a reasonable award for this head of claim which I assessed as RM500 per month on the statutory multiplier of 16 years which amounted to RM96,000.

Nursing Care

Pre-trial

[17] The multiplier of six years was not disputed. The appeal was against the multiplicand of RM2,000 per month in the award of the SCJ. The SCJ states that the award was inclusive of cost of pampers, milk and the difficulty in getting a maid. It was not explained how the figure of RM2,000 was arrived at. It is important to note that this item of claim was for cost of care only and cannot include other items like cost of pampers, milk powder, etc which are separate claims. It is trite law that any claim for special damages must be specifically pleaded and strictly proved.

[18] The evidence showed that the primary care giver was the mother as the father admitted facing medical problems. The defendants submitted that a sum or RM650 per month should be awarded based on the current salary of a full time maid.

[19] The SCJ had, in my view, erred in principle in awarding a sum of RM2,000 per month by taking into account items for which no claim was made. Having accounted for these items, I held that the proper award for this claim should be RM1,000 per month and accordingly set aside the award of the SCJ and awarded this sum which amounted to RM72,000 on a multiplier of six years.

Post-trial

[20] The dispute between the parties was as to the multiplier as well as the multiplicand.

[21] As regards multiplier, the SCJ adopted a multiplier of 40 years post injury. P was 18 years old at the time of the accident. He accepted the finding in the defendants' specialist report that P's life span as a person who sustained complete paralysis of the lower limbs as a result of a spinal cord injury would be 58 years. This figure is based on the life expectancy according to the American National Spinal Cord Injury Statistical Center. P submitted that this figure was speculative in nature considering that no independent evaluation of the life expectancy of P had been done and different variables could have been applied in the estimate. However, this is the only medical evidence on life expectancy based on P's mental and physical condition. This was produced by the defence through its specialist report and there was no medical evidence in rebuttal by P.

[22] Hence, I held that the SCJ was not incorrect and had not erred in assessing the multiplier to be adopted as 40 years based on the estimated life expectancy of 58 years. Having adopted a reduced life expectancy age, there was no further need to make a deduction of one third for contingencies.

[23] As for the multiplicand, the SCJ awarded a figure of RM3,646 per month on the ground that he concurred with P's counsel that P was entitled to be cared for in a special nursing institution for the reasons stated in the counsel's submission. The defence contended that P's quotation was exorbitant and the award based on this figure was unjustified and erroneous in view of the rebuttal evidence adduced by the defence.

[24] P's quotation is for nursing care at the Columbia Asia Extended Care Hospital located in Shah Alam, Selangor. P also produced a report and oral evidence of the General Manager and Medical Officer of this hospital to explain the facilities and standard of care provided by the hospital. While this evidence cannot be disputed, the SCJ failed to consider certain material factors before deciding to make the award by accepting *in toto* P's quotation and evidence on the issue of nursing care. He had not given any consideration to the important fact that the hospital suggested by P is in Shah Alam whereas P and his family reside in Johor Bahru. According to the P's own medical evidence, a nursing home closer to his home would be more suitable for his physical and mental well-being. It would facilitate visits from his parents and family members whereas if he were to be placed in Shah Alam, tremendous inconvenience would be caused to them for these visits, apart from having to incur transportation and accommodation costs. Moreover P, registered as a disabled person, is currently receiving medical treatment at the government hospital in Johor Bahru which could continue if he were to be kept at a nursing home in Johor Bahru.

[25] The defence produced a quotation from one Lotuskrish Care Centre home which is located in Johor Bahru barely 8 to 9 km from P's home. It is registered with the Ministry of Health and the Social Welfare Department as an approved nursing care centre. The evidence showed that it had all the appropriate facilities, staff and sufficient medical care for a disabled patient. The cost of nursing care at this centre is RM1,500 per month. Nowhere in the SCJ's grounds of decision is there any mention of why he had not considered an award based on nursing care at Lotuskrish Care Centre which, from all the relevant circumstances, appeared to be more suitable for P. It was clearly not lacking in proper medical care and facilities. Most importantly it was only a stone's throw away from P's home whereas placing him in an institution in Shah Alam was for all intents and purpose, rather unacceptable.

[26] For the above reasons I held that the SCJ had clearly erred in awarding cost of nursing care based on the manifestly high quotation tendered by P of the cost at Columbia Asia Extended Care Hospital without sufficient justification. He had failed to consider the evidence tendered as to the suitable alternative available in Johor Bahru itself at a much lower cost. I, therefore, set aside the award of the SCJ on this item and substituted for it an award of RM1,500 per month as per the quotation from Lotuskrish Care Centre on a multiplicand of 40 years less RM72,000 awarded for pre-trial nursing care which amounts to RM648,000.

Conclusion

[27] The principle as to when a court of appeal should interfere in the assessment of damages by trial court is well established. In the Federal Court case of *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 it was held:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. (See *Flint v. Lovell* [1935] 1 KB 354).

[See also *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 SC].

[28] Bearing in mind the above principle and for the reasons discussed, I allowed the appeal and cross-appeal on quantum to the extent stated in respect of the awards referred to where the assessment or decision of the trial court was clearly erroneous in principle and fact.

[29] Each party was ordered to bear its own costs.